BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PENNIE BARNHART	)	
Claimant	)	
	)	
VS.	)	
	)	
BACANI PLAZA, LLC	)	
Respondent	)	Docket No. 1,019,839
	)	
AND	)	
	)	
STATE FARM FIRE & CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 19, 2005 preliminary hearing Order entered by Special Administrative Law Judge (SALJ) Marvin Appling.

ISSUES

In his January 19, 2005 preliminary hearing Order, the SALJ ordered respondent to provide medical treatment through Dr. Stanley E. Hanshy. In doing so, he implicitly found that claimant sustained her burden of establishing that she sustained an accidental injury arising out of and in the course of her employment with respondent on September 30, 2004.

The respondent requests review of the SALJ's Order. Respondent first challenges whether claimant met her burden to establish that her injury arose out of and in the course of her employment. Put simply, respondent's business records indicate that claimant was not scheduled to work on September 30, 2004. And even though claimant was present at the respondent's store on the day in question, she was there as a customer and not as an employee. Thus, even though she may have fallen, hurting her leg and ankle, her injury is not compensable. Moreover, respondent alleges that claimant failed to establish timely

notice as required by K.S.A. 44-520. According to respondent's store manager, claimant indicated she slipped off the curb on respondent's premises, but only after she was terminated did she allege that the injury occurred while *she was performing her job duties on September 30, 2004*.

Claimant asserts that the SALJ properly concluded claimant met her burden of proving she was injured in an accident that arose out of and in the course of her employment with respondent and that proper notice was given. Claimant further argues that the issue of notice was not contested at the preliminary hearing and therefore "raising notice on appeal for the first time on a [p]reliminary [h]earing basis is not proper."[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On September 26 or 27, 2004, claimant interviewed and was hired by respondent to work as a cashier at Bacani Plaza, a local truck stop. The store supervisor, Teresa Anderson, not only interviewed claimant, but sets the weekly schedule as well. The records produced by respondent indicate that claimant was scheduled to work Monday September 27th, Tuesday the 28th and Wednesday the 29th. She was not scheduled to work Thursday, September 30, 2004.

According to claimant, she went to work on September 30, 2004. She expressly testified that she was on the schedule and working during her scheduled time period. Between 9:00 and 9:30 a.m., as she was taking the trash out the back door, claimant slipped off the sidewalk curb and fell.[2] She landed on her left leg and ankle.

Claimant says she went back into the store and reported her fall to Ms. Anderson, the store manager. According to claimant, she was in obvious pain and crying but was able to finish out her shift. No accident report was completed, but claimant testified that Ms. Anderson recommended she go see Dr. Handshy. Apparently claimant was new to the area and was unfamiliar with the local physicians.

Claimant testified that three days later she went to see Dr. Handshy.[3] In contrast, the medical records indicate claimant was seen by Dr. Handshy on October 1, 2004, the

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[1] Claimant's Brief at 1 (filed Mar. 3, 2005).

[2] P.H. Trans. at 6.

[3] *Id.* at 8.

day after her injury, and that she complained of "fall[ing] off curb yesterday at work".[4] On October 7, 2004, claimant again saw the doctor for pain in her left foot and left ankle apparently resulting from a fall on September 30, 2004 "at work".[5] Diagnostic x-rays were ordered. Following conservative treatment, claimant was eventually released to return to work on October 15, 2004 with no restrictions.

In the meantime, claimant was terminated from her position with respondent on October 7, 2004. She is currently working at a deli and wears tennis shoes to accommodate her ankle swelling. She has apparently had no further treatment.

As the manager of the truck stop, Teresa Anderson regularly makes up the work schedule the Wednesday before the week to be worked. As a result, when claimant was hired, the regular schedule had already been drafted. So, Ms. Anderson pencilled claimant in to work on Monday, Tuesday and Wednesday of the week of September 27th. Claimant was not scheduled to work September 30th and did not work on that day. She was, however, scheduled to work the day after.[6]

Each employee is expected to clock in on a register. Respondent produced a document that shows an entry for claimant on the 27th, 28th and 29th. The hours clocked in and out are generally consistent with the scheduled hours on the work schedule created by Ms. Anderson. They show that claimant clocked in just before she was scheduled to work and clocked out just before or just after her assigned quitting time. She also clocked in on October 1, 2004 at 8:44 a.m., but there is no clock out time registered. No other time clock records were produced at the hearing.

Ms. Anderson freely admits claimant came into the store on September 30, 2004, but did so as a customer rather than an employee, purchasing a soda. She did not clock in or perform any work activities that day. Nor did she receive any pay for work activities on September 30, 2004. Ms. Anderson further testified that she handles payroll and claimant received a check for the hours reflected on the schedule and time register. At no point did claimant ever complain that she was not compensated for the time she said she worked on September 30, 2004. On the other hand, claimant says she was paid for her work that day.

The day after she fell, claimant returned to work. It was this day, October 1st, that Ms. Anderson testified that claimant notified her of the fact she had injured her ankle. Ms. Anderson testified that claimant told her that "when she was leaving the day before that

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[4] *Id.*, Ex. 3 at 3 (Dr. Handshy's record dated October 1, 2004).

[5] *Id.*, Ex. 2.

[6] *Id.* at 19.

she fell off the curb, when she was walking to her car."[7] According to Ms. Anderson, claimant never told her she fell *while working* at any time before she was terminated, on October 7, 2004. It was only after she left respondent's employ that Ms. Anderson learned claimant was alleging a work-related injury.

Ms. Anderson also denies referring claimant to any doctor. She maintains that as the manager for the respondent, she has not had to deal with any workers compensation claims. But she believes that had claimant required treatment, she would have referred her to Dr. Bacani.[8]

In order for a claimant to collect workers compensation benefits he/she must suffer an accidental injury that arose out of and in the course of his/her employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[9]

Obviously, the compensability of the claim turns upon the credibility of claimant and respondent's representative. The SALJ was apparently more persuaded by claimant's testimony than that offered by Ms. Anderson. The Board has often found that where there is conflicting testimony contained in the record, it is significant that the SALJ had the opportunity to observe the testimony of the witnesses. However, in this instance the evidence includes not just verbal testimony but documents as well.

The Board finds it important that claimant was on the schedule for three days and clocked in for those three days just before she was scheduled to work. Similarly, on each of those days she clocked out at approximately the same time she was scheduled to stop working. The Board also finds it significant that claimant was not on the schedule for September 30, 2004, the day that she adamantly maintains to both the SALJ and to the physician who treated her, that she was injured.

Not even respondent disputes that claimant fell on September 30, 2004. That fact is borne out by the medical records. Moreover, at least for preliminary hearing purposes, respondent has not disputed that the fall occurred on its premises. Respondent merely denies that claimant was working on that date. This denial is not without justification.

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[7] *Id.* at 20.

[8] *Id.* at 21.

[9] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

Respondent's records do not support claimant's allegation that she was working on September 30, 2004. Ms. Anderson denies claimant was scheduled or called in to work on that date.

The Board finds, that while it often gives some deference to the individual who conducts the preliminary hearing, in this instance it cannot do so. There is certainly an inconsistency between each party's respective versions of the facts. But when examined closely, the Board is persuaded by the documentary evidence produced by respondent that shows claimant was not scheduled to work, did not clock in to work and was not paid to work on the day she said she was injured. Accordingly, the SALJ's preliminary hearing Order is hereby reversed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Marvin Appling dated January 19, 2005, is reversed .

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

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BOARD MEMBER

c: William Phalen, Attorney for Claimant
Denise Tomasic, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] K.S.A. 44-534a(a)(2).